NG HONG CHAI & ANOR

v.

PUBLIC BANK BHD;
KHOR LIANG KHEK & ANOR (THIRD PARTIES)

HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[CIVIL SUIT NO: MT(2) 22-480-2006]
8 FEBRUARY 2011

EVIDENCE: *Statements - Defamation - Statements of witnesses not called to testify - Plaintiff relied on statements of witness not called to testify - Whether statements relied on was to prove element of publication - Whether reliance on said statements hearsay*

EVIDENCE: *Witness - Credibility - Cross examination of 1st plaintiff as witness - Defamation arising from posting of proclamation of sale on property - First plaintiff testified he was alone when proclamation of sale was posted - Later testified he enquired about proclamation of sale from a crowd reading it - Whether doubts created on truth of statements*

TORT: *Defamation - Absolute privilege - Publication of proclamation of sale pursuant to court's direction - Whether action for defamation could arise from discharge of a legal duty*

TORT: *Defamation - Judicial immunity - Third parties appointed by court to carry out auction sale obtained by defendant - Third parties afforded judicial immunity - Whether defendant could be held liable for defamation*

TORT: *Defamation - Publication of proclamation of sale - Plaintiffs settled loan with defendant - Posting of proclamation of sale despite payment made - Whether defamatory of plaintiffs - Whether actual words shown and proved to have defamatory imputations - Persons who read proclamation of sale not called as witness - Whether warranting presumption of adverse inference - Proclamation of sale posted by third parties - Whether third parties agents of defendant - Whether defendant liable - Judicial immunity and absolute privilege - Whether defendant entitled to defences*

The plaintiffs were the customer of the defendant bank. The defendant initiated a foreclosure action against the plaintiff for failure to pay their loan. The court had appointed a licensed auctioneer from a limited company ('third parties') to conduct the auction sale. Prior to the auction date, the plaintiffs managed to settle their loan repayment. The defendant then instructed the third parties on the same date the repayment was made to discontinue the auction sale. Despite the defendant's instruction, the third parties proceeded to post the proclamation of sale ('POS') on the front gate of the plaintiffs' house. The plaintiffs made this claim against the defendant on the basis of defamation. The issues to be determined were: (i) whether the contents of the POS had any defamatory imputation on the plaintiffs; (ii) whether the third parties who posted the POS were agents of the defendant; (iii) whether the defendant was liable for the unauthorised act of the third parties in posting the POS; and (iv) whether the defendant was entitled to the defence of judicial immunity and absolute privilege.

Held (dismissing the plaintiffs' claim with costs):

(1) Since the parties had reached a settlement, it was wrongful to post the POS. However this mistake in itself did not prove that the POS contained defamatory statements. The POS could only be held to contain defamatory statement if the contents were untrue or falsely conveyed to the world at large by implication or innuendo that the plaintiffs could not settle their debts. This was not the case here. (para 10)

(2) In order to prove the defamatory statement, the actual words in question had to be proved and shown to have defamatory imputations reflecting upon the plaintiffs. This was not done. Even though the POS obviously referred to the plaintiff as the property owners, the specific words complained of that had the effect of defaming them, remained unknown. The offending words were not pleaded neither was it brought forth in the evidence of 1st plaintiff. In fact it was a mere assumption and speculation what the 'natural and ordinary meaning' of the words were that was conveyed to the people who may have read the POS. (paras 12 & 15)

(3) The 1st plaintiff had clearly contradicted himself during cross-examination. He testified that he was alone when he arrived home and saw the POS being posted and later changed his testimony by saying that a crowd had gathered there from whom he had enquired about the posting. This certainly created doubts in the truth of his evidence as to whether a crowd had actually appeared at that particular spot and read the POS or whether he had promptly taken it down before anyone could notice it. (para 20)

(4) The plaintiffs' reliance on statements made by third persons not called as witness to prove publication of the POS was hearsay. The onus was on the plaintiffs to prove the element of publication of the POS to third persons by the defendant. This could only be satisfied by calling anyone from the neighbourhood who had seen the POS being posted and had read it. The failure to call them as witnesses invoked the presumption of adverse inference against the plaintiffs. (paras 21 & 22)

(5) It was manifestly clear from the evidence that the third parties were aware of the defendant's instructions to call off the auction, hence their act in proceeding to post the POS was contrary to the said instructions and therefore outside the scope of authority granted to them by the defendant. The defendant could not be held to be liable for their wrongful act. (para 30)

(6) Since judicial immunity would be afforded to the third parties, as they were appointed by the court to carry out the auction sale, the defendant could not be held liable as the foundation of this claim was based on the act of the third parties in posting the POS. (paras 31 & 32)

(7) The publication of the POS fulfilled all the criteria to be accorded protection under absolute privilege. It was an act carried out in accordance with s. 258(1) National Land Code under the direction of the court registrar. An action for defamation could not arise from the discharge of a legal duty of a court officer even though third parties, to whom authority was delegated, had acted negligently. (paras 39 & 40)

Case(s) referred to:

Anne Lim Keng See v. The New Straits Times Press (M) Bhd & Anor And Other Appeals [2008] 6 CLJ 697 CA ***(refd)***

Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***

Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***

Lewis v. Daily Telegraph Ltd [1964] AC 234 ***(refd)***

Luk Kai Lam v. Sim Ai Leng [1978] 1 LNS 110 FC ***(refd)***

Lincoln v. Daniels [1961] 3 All ER 740 ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & 2 Other Appeals [1995] 2 CLJ 912 CA ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Ngoi Thiam Woh v. Maxwell Kenion Cowdy & Jones & Anor [2002] 4 CLJ 746 HC ***(refd)***

PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***

Raja Gopal v. Rajan [1971] 1 LNS 117 ***(refd)***

Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd [2008] 6 CLJ 681 FC ***(refd)***

Soh Chun Seng v. CTOS-EMR [2003] 4 MLJ 180 [2004] 5 CLJ 46 HC ***(refd)***

Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 180, 181
Courts of Judicature Act 1964, s. 14(2)
Evidence Act 1950, s. 114(g)
National Land Code, s. 258(1)

For the plaintiffs - TS Chang; M/s Henry Soong & Chang
For the defendant - KK Chan; M/s Shook Lin & Bok

Reported by Melinda Robert

JUDGMENT

Gunalan Muniandy JC:

[1] The plaintiffs ('P1 and P2') were at all material times customers of the defendant (D) bank and had charged their property (residential premises) to D as security for a loan that they had obtained. Upon their failure to settle the outstanding

sums due despite a notice of demand being issued. D commenced foreclosure proceedings against them with a view to sale by public auction of the charged property. D obtained an order for sale dated 24 March 2000 and an order for directions of sale dated 29 May 2001 in the foreclosure action. On 30 May 2001, the JB High Court, in the execution proceedings, appointed a licensed auctioneer ("1st third party ('TP')") to conduct the public auction of the property. In this respect the 1st TP acted as agent/servant/representative of a limited company ("2nd third party" ('TP')) of which he was a director.

[2] On 15 August 2001, P1 and P2 managed to fully settle the amount due and owing to D under the loan agreement. On the same day, D informed the TPs to withdraw and/or discontinue the auction sale which was scheduled to be carried out on 30 August 2001. Despite this notification, the TPs proceed to post the "Proclamation of Sale" ('POS') on the front gate of the plaintiffs' premises ('a double-storey semi-detached house') on 16 August 2001 allegedly at about 4pm.

[3] P1 and P2 commenced this defamation suit against D for posting the POS on the said date which they claimed contained words that were untrue and thus, were defamatory of them. The POS was alleged to have been made known and published to all and sundry. The basis of this suit was that P had taken action to auction the said property notwithstanding that the debt due to them had extinguished at the point in time of posting.

Issues For Determination

[4] The issues arising out of the evidence adduced at the trial, the pleadings and the relevant documents on record have been correctly set out in the defence submission as these:

(a) Whether the Plaintiffs have proven all the requisite elements to establish defamation, in particular:

(i) Whether the contents of the Proclamation of Sale (Bundle D, pages 29-31) have any defamatory imputation on the Plaintiff;

(ii) Whether the Third Parties who posted the Proclamation of Sale are the agents of the Bank;

(b) If the Third Parties are indeed the agents of the Bank, whether the Bank is liable for the unauthorised acts of the Third Parties in posting the Proclamation of Sale despite the Bank's request to the contrary;

(c) If the elements of defamation had been established, is the Bank entitled to the Judicial Immunity and Absolute Privilege; and

(d) Whether the Plaintiffs have suffered damages as a result of the above?

Analysis Of Evidence

Whether Defamation Proved?

[5] Both parties were in accord that the law places the burden of proof on the plaintiff to prove the essential elements of the tort of defamation. It is only upon there being *prima facie* evidence of this wrongful act would the evidential burden shift to the defendant to prove the available defences that are raised.

(See *'Evans on Defamation'* (3rd edn)).

[6] On the steps to be taken by the court in determining whether a statement is defamatory, plaintiffs' counsel ('P/C') brought to my attention two useful authorities on this point. In *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461, the Court of Appeal (at p. 466, para F) held:

> It cannot, I think, be doubted that the first task of a court, in an action for defamation, is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published.

And also at p. 467 para E:

> … having decided whether the words complained of are capable of bearing a defamatory meaning, the next step in the inquiry is for the court to ascertain whether the words complained of are in fact defamatory.

[7] Upon the statement being found to bear defamatory imputations, for a cause of action in defamation to succeed, it must be shown that the imputations refer to or reflect upon the reputation of the plaintiffs and that the statement was published to a third party by the defendant. (*Evans on Defamation (supra)*).

[8] The first question whether the statement is defamatory is a question of law. It is established law that defamation is the publication of a statement that tends to lower a person in the estimation of right-thinking members of society generally, or which has the tendency to cause the plaintiff to be shunned or avoided. (See *Tun Datuk Patinggi Hj. Abdul Rahman Ya'kub v. Bre Sdn. Bhd. & Ors* [1995] 1 LNS 304; [1995] 1 MLJ 393 at pp. 4024 and 4036 on the test to be applied). This is a question of fact to be decided on an objective standard.

[9] P/C argued that the POS was capable of being defamatory or bearing defamatory imputations as D did no longer have an absolute right to proceed with the auction sale at that point in time. In support of this argument, P/C relied on the case of *Ngoi Thiam Woh v. Maxwell Kenion Cowdy & Jones & Anor* [2002] 4 CLJ 746 which involved publication by the defendant bank solicitors of a POS for plaintiff's mortgaged property pursuant to a Deed of Assignment executed in favour of the bank. The learned judge, in conclusion, held:

> Since the 2nd defendant had the absolute right to proceed with the proclamation of sale the 1st defendants who acted as solicitors and thus as agents of the 2nd defendant were clearly acting within the law when they caused the advertisement to appear in the 'Star'.

[10] In the instant case, the POS was issued pursuant to a High Court order for sale and directions issued in execution proceedings thereafter. Neither the order nor directions had at any stage prior to the posting been set aside. The parties had reached settlement prior to the date of posting, which, in P/C's argument, took away the right to proceed with the auction. It was, essentially, an agreement between the parties without any order to stay further proceedings. Hence, the POS could not be said to be invalid or untrue as it reflected the state of affairs at the time of issue. There was no doubt that upon full settlement, it was wrongful to post it but this mistake itself did not, in my view, prove that it contained defamatory imputations. The POS could be held to be a defamatory statement if the contents were untrue in that it would have falsely conveyed to the world at large by implication or innuendo that the plaintiffs could not settle their debts. This was not the case here.

[11] On the basis that the POS could be seen to bear defamatory insinuations at the time of posting when there was no longer any debt due, the next step was to answer the question of fact whether it contained words that had the effect of lowering the plaintiffs in the estimation of right-thinking members of society in general. The onus was on P1 and P2 to show the specific words complained of and prove that these words had the aforesaid effect. This question of fact has to be decided objectively. In order to have this effect, the statement must have been published to a third party. Publication is a necessary element which a plaintiff has to prove to establish the tort of defamation by libel.

[12] Whether the statement was actually defamatory depends largely on the circumstances of the given case to be decided on the available facts. P1 (PW1), in testifying for the plaintiffs, did not refer to the actual words in the POS that had allegedly defamed them. In this context, defence counsel contended that the court could not rely on conjecture and assumption to arrive at a finding whether the POS contained words that actually defamed the plaintiffs when communicated to third persons. I was in agreement that as the onus of proof was on plaintiffs to prove the defamatory statement, the actual words in question must be proved and shown to have defamatory imputations reflecting upon the plaintiffs. This was not done in this case even though the POS obviously referred to them as the property owners. The specific words complained of that had the purported effect of defaming them by affecting their reputation or standing in society remain unknown.

[13] The importance of the established practice of pleading and proving the offending words cannot be overemphasized as it is from those published words that the court would be able to adjudge the 'natural and ordinary meaning' that they conveyed to the ordinary man – 'a reasonable man' as in this case where the POS was alleged to have been read by neighbours who were ordinary people. This point was dealt with in the Court of Appeal case of *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & 2 Other Appeals* [1995] 2 CLJ 912 where Gopal Sri Ram, JCA (as he then was) said:

> The statement of claim, having pleaded these offending words in para 11, proceeds to attribute to them, in accordance with well-established practice (see *Allsop v. Church of England Newspaper Ltd* [1972] 2 QB 161; [1972] 2 All ER 26; [1972] 2 WLR 600), their natural and ordinary meaning. Lawyers term it 'a false innuendo'. It is the meaning which the published words would convey to an ordinary man – a reasonable man. The mind of such a man is unaffected by the knowledge of any special circumstances that would lend to the words a particular meaning different from their ordinary meaning. Such a special or extraordinary meaning that will be conveyed only to the mind of one who has special knowledge of facts that are extrinsic to the published words is known as the 'true innuendo' or 'the legal innuendo'. Where a 'true' or 'legal' innuendo is relied upon, full particulars of the extrinsic facts that give rise to it must be pleaded: for it vests in the plaintiff a separate and distinct cause of action.

[14] The learned judge further quoted from the speech of Lord Reid of the House of Lords in *Lewis v. Daily Telegraph Ltd* [1964] AC 234 at p. 258 as follows:

> … There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of wordly affairs. I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute a meaning to the words not apparent to those who do not have that knowledge.

[15] In the instant case the offending words were not pleaded and neither were they brought forth in the evidence of PW1. Equally important, it was a matter of assumption and speculation what the 'natural and ordinary meaning' of the words was that must have been conveyed to the people who may have read the POS. What were the circumstances that could have led to plaintiffs' esteem in their minds being lowered or plaintiffs' reputation injured? Was the fact that plaintiffs' property was being put up for sale *vide* a court order understood by them in a way that was defamatory of the former? These were important questions of fact that were pertinent to the current issue but no

A evidence was led to resolve them. Hence, I found that on the issue of whether the POS had actually defamed the plaintiffs, there was no evidence thereof to support the allegation. It was a matter of pure speculation whether the contents of the POS would have been viewed negatively by the persons concerned against plaintiffs.

B

Whether The Statement Was Published

[16] On the assumption that the POS viewed as a whole, without looking at any specific words, could be regarded as having a defamatory effect, the next question would be whether there C was evidence of publication of the POS to third persons, without which libel cannot be established against D in this case? There was no doubt that the POS referred to P1 and P2, but it had to be established that the contents were communicated to third parties who had allegedly read and understood it in the natural D and ordinary sense like reasonable persons. This is where the plaintiffs ran into difficulties as manifested in PW1's own evidence which was contradictory on this vital element of defamation. Publication is understood to simply mean making known the defamatory matter to a third party other than the plaintiffs. (*Kian* E *Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32).

[17] On the question of publication, two important issues emerged. Firstly, whether the POS had actually been seen or read by any other persons or third parties as claimed by P1 (PW1)? F Secondly, whether D had caused the posting to be done by a third party ("court appointed auctioneer")? It is first useful to note what a plaintiff needs to prove in respect of this question. In *Kian Lup Construction v. Hongkong Bank Malaysia Bhd (supra)* the learned judge summarised the law on publication for the purposes of G defamation as this (at pp. 44-45):

> The final element that the plaintiff must prove is that the words of which he complains have been published to any third party by the plaintiff. As stated by Lord Esher MR in the case of *Hebditch v. Macllwaine* [1894] 2 QB 54 (at p 58):
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> H
>
> > … the material part of the cause of action in libel is not the writing, but the publication of the libel.
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> Publication means making a defamatory matter known to some person other than of whom it is written or spoken. In the case I of *S. Pamianathan v. Fenni Ibrahim* [1988] 2 MLJ 173 (at p 176), the court held that:

> In order to constitute publication, the defamatory matter must be published to a third party, and not simply to the plaintiff. By publication is meant the making known of the defamatory matter, after it has been written, to some person other than the person of whom it is written. The uttering of a libel to the party libelled is no publication for the purposes of a civil action. (*Wennhak v. Morgan* [1888] 20 QBD 635).

In *Gatley on Libel and Slander* (9th edn) at p 134, the same principle is reiterated as follows:

> The fundamental principle is that the matter must be communicated to a third party in such manner as to be capable of conveying the defamatory imputation about the plaintiff.

[18] The learned judge also adopted the comments of the Federal Court in *Luk Kai Lam v. Sim Ai Leng* [1978] 1 LNS 110; [1978] 1 MLJ 214 (at p. 215) on the extent of the plaintiff's onus of proof in regards to publication and remarked:

> Further, it also appears to suggest that the plaintiff has to go a step further to prove that in order for there to be publication, it would seem that the statement must be made in a language which the third party can understand. Hence, if the words are spoken in Mandarin to the person defamed, and are overheard by someone who does not understand Mandarin, there is no publication.

[19] Returning to the present case, it is necessary to examine carefully PW1's evidence on this point. Plaintiffs did not call as witnesses' persons who had in fact seen or read the actual words said to be defamatory in the POS that was posted. It was, thus, unknown whether these persons, if any, understood the language of the POS and what the impugned words referring to the plaintiffs meant. More damaging was the doubt that arose from PW1's testimony whether anybody from the neighbourhood had actually read or seen the POS. This was how his testimony went under cross-examination. He first confirmed his earlier evidence that he had just seen the notice (POS) in the evening of 16 August 2001 at about 6pm upon returning from work and immediately took it down before taking some photographs. He also confirmed without hesitation that he was alone then. However, when queried as to whether on taking it down he

showed it to other people, he gave a different version. He asserted that he began to enquire once he got back home as he saw a crowd looking at it. He enquired from neighbours who were talking about the notice and was told by one of them that it had been posted up at about 4pm on that day. He then took it down. The said neighbour who reported this was not in court. Neither was his identity made known.

[20] It can be observed from the above that PW1 had clearly contradicted himself on this material point. While initially maintaining unequivocally that he was alone when he arrived home and saw the POS having been posted, he subsequently changed his tune by saying that he saw a crowd had gathered there from whom he had enquired about the posting. This certainly created doubts in the truth of his evidence whether a crowd had actually appeared at that particular spot and read the POS or whether PW1 had promptly taken it down before anybody could notice it. Moreover, as pointed out by defence counsel, the evidence that an A4 size POS posted at a section of the house that was hardly prominent could have attracted a crowd was not convincing. It was a quiet residential area and by PW1's own admission, very few people passed by the house along that road. In any event, the onus was on the plaintiffs to prove the assertion that several third persons had viewed and read the POS by calling relevant witnesses but they failed to do so.

[21] I was in total agreement with the defence argument that it is only through evidence from the third persons or onlookers could the court ascertain whether they understood the language of the POS and if so, whether they understood it in a defamatory sense reflecting upon the plaintiff's indebtedness. It was further submitted that PW1's reliance on statements by third persons not called as witnesses to prove publication of the POS was hearsay and should be rejected. Counsel cited in support the case of *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 MLJ 1 (HC) at p. 8 where it was held:

> A statement made to a witness by a person who is not himself called as a witness must be shown to be relevant to a fact in issue. If the purpose to admit such statement is not shown, the court would be in no position to rule on the relevancy of the statement with regard to the facts in issue and, if not relevant at all, the statement would amount to hearsay and thereby become inadmissible.

[22] In this case, PW1's evidence on the statement made by a neighbour to him that the POS had been posted on his gate at a certain hour of the evening and had been read by other neighbours was indeed meant to prove the truth of the statement and not merely that it was made. It is recognised as hearsay and should be rejected for the purpose stated without identifying and calling the maker to give direct evidence of the said event. What was important was for the plaintiffs to prove the element of publication of the POS to third persons by D and under the circumstances of this case, the onus of doing so could only be satisfied by calling anyone from the neighbourhood who had allegedly seen the POS being posted and had read it. It is trite law that all necessary and material witnesses must be called by the party on whom the burden of proof rests, failing which an adverse inference under s. 114(g), Evidence Act would be in order.

(See *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 on the scope of s. 114(g)).

Whether the Auctioneers Were Agents of Defendant?

[23] The plaintiffs had also to prove that the publication of the defamatory statement had been made by D and not by someone else or in other words, that D had caused the publication of the POS to third persons. (See *Evans on Defamation (supra)*). It was undisputed in this case that D had played no part is carrying out the posting of the POS on 16 August 2001 which was done by the court appointed auctioneers (TPs). It was further undisputed that D had duly and promptly informed the TPs on 15.08.2001 to call off the scheduled auction and not proceed any further. The determination of the present issue depends on whether the TPs had acted as agents of D in carrying out the posting and if so, whether they had acted within the scope of authority entrusted to them.

[24] It was an agreed fact (see statement of agreed facts) that pursuant to the High Court Order For Sale and *via* the court order in the High Court Execution proceedings the TPs were appointed to carry out the entire auction process, including the posting of the POS, under the directions and supervision of the Court Registrar. The appointment was by the court and not D who were merely plaintiffs and Execution Creditors ('EC'). The

duties of the Registrar *vis a vis* an order of sale under the National Land Code (NLC) as in this case are spelt out in s. 258(1) of the Code while those of the court appointed auctioneer in carrying posting of the POS and the auction process are to be found in the Auction Sales Enactment FMS Cap 81, s. 4. Nowhere is there to be found any order or provision for an EC, such as D, to appoint the auctioneer, who, thus could not have acted as an agent of D.

[25] My view was that the posting was carried out in enforcing the order for sale in accordance with the Registrar's directions in the usual manner and that, there was no evidence to indicate otherwise. As the whole auction process was under the control of the Registrar and the auctioneer had to comply with directions as and when given, it was reasonable to presume that D was not in a position to know the actual date and time of posting. In fact, there was not a shred of evidence in this case that D had any involvement in the act of posting carried out by the TPs. The evidence, particularly the notification to the TPs to halt the auction proceedings, indicated otherwise. Having issued the notification, D could obviously not have been aware of the TPs' subsequent act to proceed with the posting the very next day. It was, thus, in all probability done without D's knowledge. I, therefore, found on the evidence that D had not in any way caused publication of the notice (POS) to third persons as they had neither participated in nor knowingly condoned the process.

[26] The governing law in respect of civil defamation in Malaysia is the Defamation Act 1957 (See *Ayob b. Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 at p. 324, per Mohamed Dzaiddin J (as he then was)). In *Ayob b. Saud*, in dealing with the burden of proof borne by the plaintiff and defendant in a defamation suit, it was held (at p. 324):

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published. Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged: *Rajagopal v. Rajan* [1971] 1 LNS 117.

[27] *Rajagopal v. Rajan (supra)* was a Federal Court judgment which held, *inter alia*:

> In a case in which it is sought to rely on this defence (qualified privilege), it is for the defendant to prove the facts and circumstances which establish that occasion as privileged. If he does that, the burden of showing actual or express malice rests upon the plaintiff and, if this is shown, communications made even on a privileged occasion, can no longer be regarded as privileged (*Halsbury's Laws of England* (3rd edn.), vol 24, s. 98, p. 55).

Further, that:

> Malice which avoids qualified privilege is ill-will or spite or any indirect or improper motive in the mind of the defendant at the time of publication and actuating it (*Halsbury's, ibid* section 1380, p 79).

[28] The point to note from the above in relation to the present case is that even if D could be considered to have in some way caused publication of the alleged defamatory statement, there was absolutely no evidence on record of D having been actuated by any malice or ill-will whatsoever in doing so as they had genuinely acted promptly to halt any further step in the auction proceedings. This was a case of a mistake by the TPs for which they could not be faulted. All the more so, they could not be regarded as having been actuated by any malice.

[29] On the premise that the TPs could be considered to have acted as D's agents in publishing the POS, the former had acted beyond the scope of authority conferred on them and there was no ratification by D of their act in carrying out the posting on 16 August 2001. As said by DW1 in his testimony:

> ... the Defendant had no knowledge of the posting of the Proclamation of Sale by the Auctioneer until after the event and the Bank never authorized or condoned the Third Parties said acts.

[30] DW1 produced evidence, both oral and documentary to establish that the Auctioneers (third parties) had received instructions in the morning of 15 August 2001 itself to withdraw the auction sale fixed on 30 October 2001. There was documentary evidence that the third parties had acknowledged receipt of the instruction. The evidence of this communication between the parties was not challenged or disputed by P. It was

manifestly clear from the evidence and documents that the TPs were aware of D's instructions to call off the auction scheduled on 30 August 2001 in the late morning of 15 August 2001 itself. Hence, their act in proceeding to post the POS on 16 August 2001, despite being instructed not to proceed, was contrary to the said instructions and thus, outside the scope of authority, if any, granted to them by D. This meant that D could not be held liable for their wrongful act, if it could be regarded as such, as it amounts to a breach of the contractual terms. (See ss. 180 and 181, Contracts Act 1950).

Defence of Judicial Immunity

[31] It was contended that even if D is held responsible for publication of the POS, the publication was protected as a judicial act under s. 14(2), Courts of Judicature Act 1964 which reads:

> No officer of any court or other person bound to execute the lawful warrants or orders of any Judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

[32] The contention was on the ground that the POS was effected pursuant to a Court Order For Sale and Directions and by the court appointed auctioneer who had to act within the relevant auction law. As the above sub-section afforded protection to the third party auctioneers in carrying out the said judicial directions, D could not be held liable as the foundation of this claim was the same act as that of the third parties. I agree because an act in execution of judicial orders or directions, even if mistake or negligence is involved, cannot be the basis of a claim for defamation. Hence, D could not be held liable for that very same act which was beyond their control. In any event, a statement that is true cannot be defamatory. There was nothing untrue in the contents of the POS, which was, presumably, duly approved by the court for posting/publication. It was as correctly argued by defence counsel, superseded by events upon full settlement by plaintiffs and perhaps did not give a correct picture at the point in time of publication. The third parties' act may have been negligent but this by itself did not make the contents of the POS untrue and defamatory of the plaintiffs.

[33] Defence counsel sought to drew an analogy between the present case and *Soh Chun Seng v. CTOS-EMR* [2004] 5 CLJ 46, which involved publication of out-dated information regarding a creditor's petition presented against the plaintiff, where it was held:

> The court could not agree with the plaintiff's propositions that the defendant was under a duty, imposed in the law of libel, to publish the most up-to-date account as to the status of the bankruptcy proceedings brought against the plaintiff or make every effort to ascertain the most up-to-date account as to the status of the bankruptcy proceedings before it published the matters contained in the said report. The law of libel afforded a remedy where a person was libelled by the publication of defamatory words. Damages for the omission to publish words were not the domain of the tort of libel. It may well be that where such omission had occasioned loss to a party, that party may have his remedy in the tort of negligence, but as the law of libel catered for situation where words were published, a complaint of omission to publish, fundamentally, cannot found an action in libel. The law of defamation imposed a singular, paramount duty on the publisher – to speak to truth. The ingredients of the tort of negligence should not be allowed to be used to make true but defamatory statement actionable (see pp 194H-195D, 196C).

[34] Similarly, in our case, a negligent act in publishing information that was hitherto true but became outdated subsequently or was superseded by subsequent events could not be the foundation of a claim for the tort of libel as the ingredients of this tort differ vastly from that of negligence.

Defence Of Absolute Privilege

[35] This defence was pleaded in the alternative and several authorities said to apply to the present factual scenario were cited. It was contended that as the posting of the POS was done in compliance with a subsisting court order in the course of a judicial proceedings the publication was an occasion of absolute privilege at common law and therefore could not be the subject of and give rise to the present cause of action.

[36] The extent of applicability of this defence to judicial proceedings is well stated in the classic case of *Lincoln v. Daniels* [1961] 3 All ER 740 at p. 749 (per Devlin, LJ):

> The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the … .

[37] The principle in *Lincoln v. Daniels (supra)* was referred to and adopted in the Federal Court case of *Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn. Bhd.* [2008] 6 CLJ 681 which involved a Companies Winding-Up Petition advertised by the appellant/defendant in The Star newspaper which was published on 12 May 1999 even though the respondent/plaintiff's cheque in full settlement of the amount due had cleared on 11 May 1999. The respondent's claim at the High Court for libel was on account of the advertising of the petition in The Star as above despite the debt having been fully settled. The relevant part of the Federal Court judgment (per Ariffin Zakaria, FCJ) reads:

> The fact the appellant had received payment of the debt was all the more reason for the need for the petition to be advertised. The respondent could not argue that it was able to pay its debt by its own failure to comply with the demand. The payment of the debt after the petition had been filed did not in any way alter the situation (see para 33).
>
> Under the scheme of the Act and the Rules, the advertisement was clearly mandatory and in the circumstances, the advertisement was absolutely privileged. This would fall squarely under the second category of absolute privilege as mentioned by Devlin LJ in *Lincoln v. Daniels* [1962] 1 QB 237 (see para 34).

[38] Defence counsel referred to several other authorities in contending that publication of a statement was privileged and no action lay in respect of it if the act was done on the authority of a court in accordance with law and pursuant to an order of court. A case in point would be *Anne Lim Keng See v. The New Straits Times Press (M) Bhd & Anor And Other Appeals* [2008] 6 CLJ 697 where the Court of Appeal concluded after referring to the principle enunciated in *Fleming v. Newton* (1 HLC 363):

> Under the circumstances discussed above in relation to the instant appeal, we are of the view that the said advertisement is absolutely privileged and the learned judge was correct in making the decision that he did. The said advertisement was published on the authority of a court within Malaysia and r. 110 of the Bankruptcy Rules read together with r. 97 of the same clearly provides that a bankruptcy notice can be served by way of substituted service.

[39] The publication of the impugned statement (POS) in the present case appeared clearly to fulfil all the criteria as envisaged to be accorded protection under absolute privilege. It was certainly an act under the authority of the court carried out in accordance with law (s. 258(1), National Land Code – 'NLC') under the direction of the Court Registrar. In fact it was his duty to cause the sale to be publicly advertised, which he did by delegating authority to a licensed auctioneer to carry out posting. Section 258(1), NLC which relates to an Order for Sale reads:

> (1) Where any such order has been made, it shall be the duty of the Registrar of the Court:
>
> (a) to serve a copy thereof on the chargor, and on every charge of the land or lease in question; and
>
> (b) to see that the sale is publicly advertised in accordance with rules of court or, in the absence of any rule in that behalf, the practice customarily adopted in the State.

[40] No action for defamation could thus arise from the discharge of a legal duty as above by a court officer even though a third party to whom authority had been delegated may have acted negligently or without due diligence in ascertaining the current status. It was more so against the bank (D) who were not a party involved in the process of publication under the above provisions and had no authority to carry out the publication or to decide when it should be done.

Decision

[41] Parties were in agreement that it is well settled that in an action for defamation, the plaintiff bears the onus of proving that the words complained of had defamatory imputations against the defendant. A further step for the plaintiff to succeed would be to prove that under the prevailing circumstances the words in fact

defamed him by publication to third parties. In this regard he must prove the actual words that had allegedly defamed him in the eyes of the persons to whom they were published or who had read them. The plaintiffs failed to plead specifically and prove what the actual words were and how they could have defamed them by affecting their reputation.

[42] Assuming that the POS read as a whole could be regarded as containing words against the plaintiffs that fulfilled all the elements of a defamatory statement, the evidence did not disclose that D had caused it to be published to persons other than the plaintiffs. As the publication was done by the court appointed auctioneers ('third party') in compliance with directions given by the court pursuant to an order for sale, the element of publication was not proved against D, who were not in a position to know the actual physical posting by the third party at the material time. The evidence and all the records pointed to the third party having acted as an appointee of the court and not as an agent of D. Upon the plaintiffs having made full settlement, D acted reasonably and promptly in notifying the third party to call off the auction proceedings. Hence, D could not be said to have intentionally and maliciously caused posting of the POS that had been overtaken by events. The act of the third party in not heeding their instructions was beyond their control. Even if the third party could by implication be considered to have acted as an agent of D, they had acted outside the parameters of authority conferred on them by acting against instructions such that D could not be held liable for their wrongful acts.

[43] Lastly, for reasons that have been discussed, the defences of judicial immunity and absolute privilege applied to the nature of publication in this case. I, therefore, held that on the facts a claim for defamation had not been made out against the defendant for allegedly publishing the statement said to be defamatory of the plaintiffs. This claim was, accordingly, dismissed with costs.